Supreme Court, U.S.
FILED
JUL 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1910

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BUSINESS ELECTRONICS CORPORATION,
Petitioner

v.

SHARP ELECTRONICS CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 21, 1986

CERTIORARI GRANTED JUNE 8, 1987

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Civil Action No. H-78-1020

Business Electronics Corporation and
Kelton Ehrensberger, an individual d/b/a
Electronic Business Machines,
Plaintiffs,

v.

Sharp Electronics Corporation,
Defendant.

RELEVANT DOCKET ENTRIES

DATE—NR.—PROCEEDINGS

6-7-78—Received the following filed instruments from WD of Tx., San Antonio Div., SA-76-CA-49, as follows:

7-11-75—Complaint, filed. (3) summons issued.

5-15-78—Motion for Leave to File Amended Complaint and for Transfer to Southern District of Texas, filed.

6-5-78—FILE TRANSFERRED TO SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION.

2-11-82—(GKMc) ORDER, filed. Parties ntfd. aa

1. The first Amended comp. is deemed to have been filed with leave of court in its entirety.

2. The damage allegation in the first amended comp. is deemed to be $1,245,000 instead of $500,000. Pltfs. need not file any other amendment.

3. The amendments in the first amended comp. relate back to the filing of the orig. comp.

2-11-82—(GKMc) ORDER, filed. Parties ntfd. aa
1. Defts motion for summary judgment is DENIED.
2. Deft's motion to strike is DENIED.

10-11-83—JOINT SECOND AMENDED PRETRIAL ORDER, filed. fm

w/a. pltf's Requested voir dire questions
b. pltf's Proposed charge to jury
c. deft's Requested voir dire Instructions and Examination
d. deft's Requested jury instructions and special verdict
e. pltf's exhibit list
f. deft's exhibit list

10-17-83—(WS) 1ST DAY JURY TRIAL, filed . . .
Jury selected . . . Pltf. opening statement; deft. opening statement; Pltf. witness: Kelton Ehrensberger.

10-18-83—(WS) 2ND DAY JURY TRIAL, filed . . .
Pltf. witness: Kelton Ehrensberger, cont.
Adjourned to resume 10-19-83 at 10:00 a.m.

10-19-83—(WS) 3RD DAY JURY TRIAL, filed . . .
Pltf. witness: Gilbert Hartwell, testimony from deposition of Hitasake Nishitan.
Adjourned: to resume 10-20-83 at 10:00 a.m.

10-20-83—(WS) 4TH DAY JURY TRIAL, filed . . .
Pltf. witness: Joseph M. Chernow, testimony from deposition of Thomas George Mashos, testimony from deposition of Thomas Jesse Burkholder, Jr. adjourned. To resume on 10-24-83 at 10:00 a.m.

10-24-83—5TH DAY JURY TRIAL, filed . . .
Pltf. witness: Testimony from deposition of Thomas Jesse Burkholder, Jr. cont'd.
Pltf. rests.
(outside presence of jury) Deft. moves for directed verdict in favor of deft.—overruled. Deft. witness: Thomas Jesse Burkholder, Jr.
Adjourned: to resume 10-26-83 at 10:00 a.m.

10-26-83—6TH DAY JURY TRIAL, filed . . .
Testimony of Thomas Jesse Burkholder, Jr. cont'd. . .
Adjourned to resume 10-27-83 at 10:00 a.m.

10-27-83—7TH DAY JURY TRIAL, filed . . .
Testimony of Thomas Jesse Burkholder, Jr. cont'd.
Testimony of Gilbert Hartwell, Testimony of Thomas Jesse Burkholder, Jr. cont'd.
Adjourned to resume 10-28-83 at 10:00 a.m.

10-28-83—8TH DAY JURY TRIAL, filed . . .
Deft. witness: Steve Jizmagian;
Adjourned: to resume 10-31-83 at 10:00 a.m.

10-31-83—9TH DAY JURY TRIAL, filed . . .
Deft. witnesses cont'd: Gary Walther, testimony from deposition of Thomas George Mashos, testimony from deposition of Hiroshi Kawai. Adjourned to resume at 10:00 a.m. on 11-1-83.

11-1-83—10TH DAY JURY TRIAL, filed . . .
Pltf. cross-examination by reading testimony from deposition of Thomas George Mashos; pltfs. cross examination by reading testimony from deposition of Hiroshi Kawai; defts. redirect by reading testimony from deposition of Kiroshi Kawai. Deft. witness cont. Ira J. Tabanken; deft. adverse witness, Kelton Ehrensberger; Charles Leslie.
Pltf. rests, defts. rest. Adjourned to resume on Nov. 3, 83 at 10:00 a.m.

11-2-83—MOTION HEARING, Filed . . .
Deft. motion f/directed verdict on 1) liability, 2) Rule of Reason, 3) Per Se Theory, 4) Damages—Overruled.
Adjourned. To resume: Nov. 3, 1983 at 10:00 a.m.

11-3-83—11TH DAY JURY TRIAL, filed . . .
Pltf. opening arguments, defts. closing argument. Pltf. closing argument.
Jury charge—Alternate juror excused. (outside presence of jury) deft. makes objections to jury instructions—overruled. Jury deliberates.
Adjourned at 4 p.m. to resume deliberation 11-4-83 at 10:00 a.m.

11-4-83—12TH DAY JURY TRIAL, filed . . .
Jury deliberating. Verdict in favor of pltf.

11-30-83—Pltf. MOTION FOR ENTRY OF JUDGMENT, filed.

12-7-83—(WS) JUDGMENT, filed, Parties ntfd. . . The amended orders signed and entered Dec. 1, 83, are vacated. Pltf. recover of deft. Sharp Electronics the sum of $2,036,875.

12-19-83—Deft's MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, or in the Alternative, FOR A NEW TRIAL, filed.

1-9-84—Pltf's MEMORANDUM IN OPPOSITION to deft's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, filed.

9-28-84—(WS)—MEMORANDUM AND ORDER, filed. Parties ntfd.
1. Deft's Motion f/Judgment notwithstanding verdict, or for New Trial is DENIED.
2. This is a Final Judgment.

10-26-84—Deft. NOTICE OF APPEAL from the Final Judgment entered on Sept. 28, 1984, filed.

10-26-84—Filing & Docketing Fees Both paid #104033.

10-30-84—Record on Appeal consisting of All Original Papers (7 Vols.)
Exhibits (1 Expandable folder) Transcripts (15 Vols.) Depositions (17 Vols.) forward to the Court of Appeals.

10-31-84—Case Number 84-2618 docketed in the United States Court of Appeals for the Fifth Circuit.

1-21-86—Opinion of Court of Appeals Rendered. Reversed.

2-4-86—Appellee's Petition for Rehearing En Banc filed.

2-20-86—Order of Court of Appeals Denying Rehearing.

6-5-86—Notice of Flg. of Cert. Pet. on 5-21-86.

6-12-87—Order of S.C. Granted 6-8-87.

DEFENDANT'S EXHIBIT 121

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-78-1020

BUSINESS ELECTRONICS CORP., ET AL.,
Plaintiffs,

v.

SHARP ELECTRONICS CORPORATION,
Defendant.

DEFENDANT'S REVISED JURY INSTRUCTIONS AND SPECIAL VERDICT

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DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 23

Necessity of Agreement on Price

In addition to finding an agreement between Sharp and Hartwell, you must also find that the agreement was to fix or maintain resale prices of Sharp calculators at a certain level and not just that the agreement may have had some effect on price. Not every agreement that has some effect on price is a price fixing agreement. Every decision a manufacturer makes necessarily affects the price of its product. For example, anytime a manufacturer terminates a dealer and replaces him with another dealer, or appoints an exclusive dealer—things perfectly legal under the antitrust laws—this may have an effect on the resale price of the manufacturer's products. Similarly, the manufacturer may impose restrictions on where or to whom a dealer may sell, and these restraints will have highly foreseeable consequences on the price at which a dealer will resell the manufacturer's product. However, they do not constitute vertical price fixing or resale price maintenance, and they are not in and of themselves illegal.

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 23 (1979); *Oreck Corp. v. Whirlpool Corp.*, 563 F.2d 54, 59 (2d Cir. 1977), *cert. denied*, 439 U.S. 946 (1979); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 513 F. Supp. 1100, 1146-47 (E.D. Pa. 1981).

TRANSCRIPT OF PROCEEDINGS

Testimony of Gilbert Hartwell

(Witness on Behalf of Defendant)

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HARTWELL — CROSS

* * * *

Q. What made you believe, instead of quitting at that point in time, Mr. Ehrensberger had already been terminated?

A. Because I had already turned down the number 1 machine, which was Cannon.

Q. How many employees did you have at that time when you signed your Sharp dealership, approximately?

A. Approximately six to seven.

Q. All right. Now, at the time that you assumed your Sharp dealership and during the time that you were a Sharp dealer did anyone from Sharp ever tell you that you had to accept and had to price at the suggested list prices that Sharp listed for its various calculators?

A. No.

Q. Did you ever for any reason believe that Sharp was insisting that you price at suggested list price?

A. No.

Q. You testified yesterday, I believe, that hardly a day goes by that you don't make a deal at suggested list price, is that right?

A. We make sales at suggested list price, but we also discount. My sales people have that latitude.

Q. And that happens almost everyday?

A. Yes.

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* * * *

Q. Did you tell him that you would sell your products at the suggested list price if they picked you?

A. No.

Q. Did you tell him that you would sell to the national accounts at the suggested discount and no more, no less if they picked you?

A. No. Wasn't discussed.

Q. What did Mr. Mashos tell you in return in that conversation?

A. Where?

Q. In this conversation you made to him in June 1973 where you ask him to make a choice between either of you?

A. He promised within 30 days he would get back to me.

Q. All right. Now, you testified yesterday that the next time you heard from anybody from Sharp in connection with this was when Mr. Mashos came to advise you in your office in Houston in mid July of 1973. Could you tell us about that meeting and how it occurred, who called whom and what was said at the meeting?

A. Well, his meeting with me at that time was as a result of my call for him to make a decision. So then an appointment was subsequently followed through that he come to Houston to visit with me.

Q. Several weeks later?

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A. Sometime between two to four weeks, almost 30 days, I believe. Maybe it was before 30 days after my call. But it was within the time span.

Q. Now, did he call that meeting to come to consult with you about asking your opinion on whether they ought to cancel Mr. Ehrensberger?

A. No.

Q. What did he tell you?

A. Well, when he came into my office he asked me what were my plans, and so forth, if I was a Sharp dealer. So I told him of what I was prepared to do from crank-up; hire a sales force again, to recruit and start a service department, advertise. And then he subsequently had—well, he immediately told me Mr. Ehrensberger had been notified that he had been terminated, and that Sharp had made the decision for Hartwell's Office World as a their dealer here in Houston.

Q. Did Mr. Mashos ask you anything during that meeting about the prices at which you were going to charge your customers for Sharp products?

A. No. Mr. Mashos' decision had already been made when he arrived in my office in Houston.

Q. Did he ask you anything while he was in your office in mid July 1973 about the pricing policies that you were going to follow?

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A. No.

Q. Did you tell them anything about the pricing policies that you intended to follow?

A. No.

Q. Did you make any commitments to them or discuss at all what your pricing policies had been or would be?

A. No.

Q. Did you come away from that meeting thinking that you had some commitment to Sharp or had made

some commitment; legal, moral or otherwise, to price your products at a particular price?

A. No.

Q. Had you had any prior knowledge before that meeting in mid July 1973 with Mr. Mashos, any prior knowledge at all that Sharp had decided to cancel Mr. Ehrensberger's dealership?

A. Did I know if they had made the decision?

Q. Before that meeting with Mr. Mashos.

A. Yes, sir.

Q. Had you had any information at all that the decision had already been made to cancel Mr. Ehrensberger's dealership?

A. No.

* * * *

Testimony of Thomas George Mashos By Deposition

(Witness on Behalf of Defendant)

[1311]

MASHOS — BY DEPOSITION

Mr. Harvin: Stop on line 20, and pick up on line 27, page 20.

"Q. Was Mr. Ehrensberger's pricing policy something that you kept up with on a regular basis?

"A. No.

"Q. Are the pricing policies of your dealers nationwide something that you kept up with regularly?

"A. Well, we have suggested retail prices, but they sell them for what they want to sell them for.

"Q. Did you terminate Mr. Ehrensberger because he was discounting the product.

"A. Discounting—

"Q. Discounting the product?

"A. No.

"Q. Did you have a policy of terminating discounters?

"A. No.

"Q. Do you know whether there are any other Sharp dealers who engaged in price cutting, price dicounting?

"A. Do I specifically? No.

"Q. Just generally do you know?

"A. Generally I am sure a lot of them do.

"Q. In this lawsuit, Mr. Ehrensberger also alleges that he was terminated pursuant to an agreement between Mr. Hartwell and Sharp to fix the retail price of Sharp calculators in Houston. Did you, Mr. Mashos, have any agreement with Mr.

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Hartwell that he would be required to sell Sharp calculators at a price fixed by Sharp?

"A. No.

"Q. Did you have an agreement with Mr. Hartwell that if Mr. Ehrensberger were terminated, Mr. Hartwell would thereafter sell calculators at prices established by Sharp?

"A. No.

"Q. Mr. Mashos, do you know of any other person at Sharp who might have made such an agreement with Mr. Hartwell that he would sell at prices dictated by Sharp?

"A. No."

Mr. Harvin: Stopping on line 8, page 22.

Go to page 24, line 27.

"Q. When Mr. Hartwell demanded that you terminate Mr. Ehrensberger you didn't refuse to do so, did you?

"A. I did. He requested that many times. Shortly after I became a national sales manager. That was an ongoing complaint by Mr. Hartwell."

Harvin: Stop on line 4. Go down to line 16, page 25.

"Q. Wait. That is not my question. My question is, when he delivered this ultimatum to you you didn't refuse his request, did you? You didn't say to him, 'I'm not going to cancel Mr. Ehrensberger,' did you?

"A. I don't recall saying anything to him except, 'I will have . . .

District Court's Jury Instruction and Special Verdict on Elements for Liability Under Section 1 of the Sherman Act

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* * * *

The general objectives of the antitrust laws, including the Sherman Act, are to preserve and advance our system of free and open competition, and to secure to everyone an equal opportunity to engage in a business trade and commerce of this country—a policy which is the primary feature of our private enterprise system. The law promotes the concept that free competition yields the best allocation of economic resources, but it also recognizes that in the natural operation of our economic system some competitors are going to lose business while others prosper. Acts become unlawful only when they constitute an unreasonable restraint on interstate commerce.

The specific conduct which Plaintiff claims violated Section 1 of the Sherman Act is an alleged combination, agreement or understanding between Sharp Electronics Corporation and Gilbert Hartwell to terminate Business Electronics as a Sharp dealer because of Business Electronics' price cutting.

Speaking generally, there are three essential elements that the Plaintiff must prove by a preponderance of

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the evidence in order to establish a claim.

(1) That there was an agreement or understanding between Sharp and Hartwell to terminate Business Electronics as a Sharp dealer because of Business Electronics' price cutting;

(2) That the Plaintiff was terminated as a proximate result of the alleged illegal agreement or understanding; and

(3) The amount of money necessary to fairly compensate Plaintiff for the damage proximately caused by Defendant's conduct in violation of the federal antitrust laws.

The burden of proof is on the Plaintiff to establish each one of these elements of his claimed cause of action to your satisfaction by a preponderance of the evidence.

You will be asked to return your verdict in this case in the form of answers to three questions which will be submitted to you concerning the various factual issues in this case. These questions are on the special verdict form that I will now show you. And you will have this in the jury room with you.

At this time I will read this form briefly.

I'm now going to turn to the questions on your special verdict form, and give you the instructions of law

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applicable specifically to your deliberations on each of those questions: of course, as I have told you earlier, you

are to consider all of my instructions as a whole and are not to single out any particular instruction.

Question Number 1 asks you whether you find by a preponderance of the evidence that there was an agreement or understanding between Sharp and Hartwell to terminate Business Electronics as a Sharp dealer because of Business Electronics' price cutting.

An illegal agreement or understanding is formed when two or more persons or corporations knowingly join together to accomplish some unlawful purpose by a concerted action. To act knowingly is to act voluntarily and intentionally, not because of mistake or accident. The essence or an illegal combination, agreement or understanding is an agreement or understanding between two or more persons or corporations to violate or disregard the law. However, the evidence in the case need not show that the members of an alleged illegal combination, agreement or understanding entered into any express or formal agreement.

What a preponderance evidence of the evidence in the case must show in order to establish the existence of the required combination, agreement, or understanding is that Sharp and Hartwell knowingly came to a common and mutual understanding to accomplish or to attempt to accomplish an

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unlawful purpose.

The evidence need not show that the members of the illegal agreement or understanding specifically stated between themselves what their purpose was to be or the

means by which the object or purpose was to be achieved. Purpose or intent may be proved by indirect evidence. While witnesses may see and hear and thus be able to give direct evidence of what each person does or fails to do, there can be no eyewitness account of the state of mind with which the acts were committed. What a person does may indicate either intent or lack of intent.

An illegal combination, agreement or understanding does not need to be in writing. An agreement can be implied where the terms are not declared by the parties but are fairly inferred from the circumstances showing a mutual intention to agree. The term implied agreement refers to a situation where the intention of the parties not manifested by explicit and direct words but is rather by implication or necessary deduction from the circumstances or from the general language or other conduct of the parties.

Plaintiff does not have to show that the persons who joined the alleged illegal combination, agreement or understanding intended to violate the law and knew that they were violating the law. A motivation or intention to

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break the law is not required for there to be an illegal combination, agreement or understanding.

In determining whether Sharp illegally combined or agreed with another party to fix retail prices of calculators, you are instructed that a corporation cannot illegally agree or combine with its officers, employees, or agents. Every act of every officer, employee, or other agent, on behalf of, or in the name of a corporation, if done within

the scope of his authority, is in law the act of the corporation itself. Because a corporation cannot illegally combine or agree with itself, any agreement between officers, employees, or agents of the corporation and the corporation itself cannot constitute an illegal agreement or understanding.

You are instructed Mr. Burkholder was an agent of Sharp, and that Hartwell was not an officer, employee, or agent of Sharp.

It is not necessary for the Plaintiff to join as Defendants in this case all persons who may have participated with the Defendant in the alleged illegal combination, agreement or understanding. A person injured by such an illegal combination, agreement or understanding, if any, may recover against one or all those participating, and he may enforce his right to recover against one, or some, or all, at his election. It is immaterial, as a matter of law,

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that any other member of the alleged combination, agreement or understanding, if any, may have not been joined in this suit by the Plaintiffs.

The Sherman Act is violated when a seller enters into an agreement or understanding with one of its dealers to terminate another dealer because of the other dealer's price cutting. Plaintiff contends that Sharp terminated Business Electronics in furtherance of Hartwell's desire to eliminate Business Electronics as a price-cutting rival.

If you find that there was an agreement between Sharp and Hartwell to terminate Business Electronics because

of Business Electronics' price cutting, you should answer "yes" to Question Number 1.

Sharp, on the other hand, contends that it terminated Business Electronics unilaterally, not as a result of any agreement or understanding with Hartwell, but because of Business Electronics' sales performance. If you find that Sharp did not terminate Business Electronics pursuant to an agreement or understanding with Hartwell to eliminate price cutting by Business Electronics, then you should answer "no" to Question Number 1.

A combination, agreement or understanding to terminate a dealer because of his price cutting unreasonably restrains trade as a matter of law and cannot be justified

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for any reason. Therefore, even though the combination, agreement or understanding may have been formed or engaged in to prevent or halt what the parties perceived to be ruinous price competition or to eliminate any alleged evils of price cutting, it is still unlawful. It makes no difference whether prices were reasonable or unreasonable.

If a dealer demands that a manufacturer terminate a price cutting dealer, and the manufacturer agrees to do so, the agreement is illegal if the manufacturer's purpose is to eliminate the price cutting.

If you answer "yes" to Question Number 1, Question Number 2 asks you to determine whether the alleged combination, agreement, or understanding caused injury to Plaintiff's business. In this connection, Plaintiff contends that the termination of Plaintiff as a Sharp dealer

caused Plaintiff to lose profits from lost sales of electronic calculators.

Plaintiff must establish as a part of its claim that it suffered injury in its business or property as a proximate result of alleged combination or conspiracy. It frequently occurs in the course of normal, lawful competition that some business may suffer economic losses or even go out of business. It is only when such economic losses are caused by unlawful competitive practices that the antitrust laws are violated. An injury to a business can be said to be the

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"proximate result" of antitrust violation only when the act or transaction constituting the violation directly and in natural and continuous sequence produces, or contributes substantially to producing, such injury. In other words, the alleged violation or violations of the Sherman Act by the Defendant, if any, must be a direct, substantial and identifiable cause of the injury which Plaintiff claims to have sustained.

The ultimate success or failure of the combination, agreement or understanding to accomplish the common object or purpose is immaterial, so long as the Plaintiff sustained some damage as a result of the combination, agreement or understanding.

If you find that the alleged combination, agreement or understanding proximally caused injury to Plaintiff's business, then you should answer "yes" to Question Number 2.

* * * *